No. 14-19-00154-CR

In the
Court of Appeals
for the
Fourteenth District of Texas
at Houston

———♦———

No. 1527611
In the 208th District Court
Harris County, Texas

———♦———

THE STATE OF TEXAS
Appellant
V.
JOHN WESLEY BALDWIN
Appellee

———♦———

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APPELLEE REQUESTS ORAL ARGUMENT

STATEMENT REGARDING ORAL ARGUMENT

Appellee requests oral argument. This case concerns the suppression of important evidence and statements in a capital murder case. It also addresses what law enforcement needs to establish probable cause to seize and search a cellular device that has no apparent connection to the commission of the offense.

IDENTIFICATION OF THE PARTIES

Pursuant to TEX. R. APP. P. 38.2(a)(1)(A), a complete list of the names of all interested parties is provided below.

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Trial Judge:

Hon. Denise Collins and Hon. Greg Glass

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

RULES

CONSTITUTIONAL PROVISIONS

TO THE HONORABLE COURT OF APPEALS:

STATEMENT OF THE CASE

Appellee was charged by indictment with capital murder. (CR 10). Appellee filed a pre-trial motion to suppress his statements and any evidence obtained through the seizure and search of his cell phone. (CR 88-95). After a

hearing was conducted, the trial court found that the affidavit in support of the search warrant failed to establish probable cause to search appellee's vehicle or his cellular phone. (RR II 16, 17). The State is appealing the court's decision. (CR 97-99).

STATEMENT OF FACTS

The complainant, Adrianus Kusuma, and his brother, Sebastianus Kusuma, were home the evening of September 18, 2016, when two African American males forced their way into the home. (State's exhibit, 4). The masked intruders were armed with handguns. (State's exhibit, 4). Sebastianus was beaten and Adrianus was shot and killed. (State's exhibit, 4). The perpetrators stole a box of receipts and money and fled through the front door. (State's exhibit, 4).

Sebastianus followed the men outside and observed them getting into a white, four-door sedan. (State's exhibit, 4). A neighbor observed a white, four-door sedan exiting the neighborhood at approximately 8:45 p.m. at a "very high rate of speed." (State's exhibit, 4). Another neighbor informed law enforcement that she observed a white, four-door sedan, with license plate number GTK-6426, in the neighborhood on multiple occasions on September 17, 2016. (State's exhibit, 4). The vehicle was occupied by "two black males." (State's exhibit, 4).

Law enforcement located a residential surveillance video that depicted a white, four-door sedan in the neighborhood once on September 18, 2016, and three

times on September 19, 2016. (State's exhibit, 4). A citizen also reported that he observed a white Lexus GS300 that "lapped his residence" three times. (State's exhibit, 4). The vehicle was driven by a "large black male[1]." (State's exhibit, 4).

The lead homicide investigator, Casey Parker, ran the license plate and learned the vehicle was registered to Steven Peterson. (RR I 123). Mr. Peterson claimed that he sold the Lexus to his stepson, appellee. (RR I 123). Mr. Peterson also reported that appellee lived with his girlfriend in an apartment complex. (RR I 123). Homicide investigators located the Lexus at the apartment complex on September 22, 2016. (RR I 124). When appellee left in the Lexus, Parker advised a nearby patrol deputy, Michael Johnson, to "get probable cause" and pull over appellee. (RR I 126).

Deputy Johnson followed appellee on the North Freeway for a brief period and stopped him for making an unsafe lane change. (RR I 10). Johnson testified at the suppression hearing that he observed appellee travel from the middle lane, smoothly into the right lane and onto the exit ramp. (RR I 10). Appellee used a turn signal, but Johnson felt the "gliding" across the lanes was unsafe. (RR I 11).

Appellee was arrested for the traffic violation[2] and transported to the Harris County Sheriff's Office (HCSO) homicide division. After being interrogated,

[1] Appellee is 5'9" and 180 lbs. (RR I 195).
[2] Appellee also had a suspended driver's license. (RR I 16, 17).

appellee consented to a search of his vehicle, but declined consent to search his cell phone. (RR I 29). Appellee was subsequently charged with capital murder.

Appellee filed a motion to suppress, challenging the legality of the traffic stop and the seizure and search of his cell phone. (CR 88-95). The hearing was presided over by Judge Denise Collins. Judge Collins made oral findings of fact and conclusions of law. (RR II 4-18). She determined that the traffic stop was lawful, but that the warrant failed to allege facts that established probable cause to believe that appellee's cell phone contained evidence of a crime. (RR II 17-18). Judge Collins did not sign a written order granting the motion to suppress. In January 2019, Judge Greg Glass was sworn in as the presiding judge of the 208th District Court. Judge Glass signed an order granting the motion to suppress. (CR 96). The State is appealing the order. (CR 97-99).

SUMMARY OF THE ARGUMENT

The trial court did not err in granted appellee's motion to suppress. The affidavit accompanying the search warrant failed to allege specific facts

establishing probable cause that appellee, or the vehicle he was driving four days after the offense, were linked to the murder. Further, the affidavit does not contain any evidence that the seized cell phone contained evidence of the offense. To infer otherwise is unreasonable.

The trial court did not abuse its discretion in granting appellee's motion to suppress his statements. There was no reasonable suspicion to believe that appellee committed an unsafe lane change simply because he failed to pause for a decipherable period of time in each lane before moving from the center lane of the highway to the exit ramp. Appellee used a turn signal, did not cut off any other vehicles, and did not commit any other traffic violations.

Appellee also did not disregard a traffic control device. The video of the stop fails to show that appellee entered the triangled, striped portion of the highway that divides the right lane and the exit ramp. And even if the tires of appellee's vehicle touched that portion of the highway, the State has failed to establish these markings are a 'traffic control device" as defined by the Transportation Code, the purpose of this marking, and what constitutes a violation of entering this area.

REPLY TO APPELLANT'S FIRST POINT OF ERROR

In its first point of error, the State contends that the trial court erred in finding that the affidavit lacked probable cause and in granting appellee's motion

to suppress the seizure and search of appellee's cell phone. Specifically, the State contends that the court did not defer to all reasonable inferences that the magistrate could have made when authorizing the warrant. The State's argument can be summarized as follows:

> From the face of the affidavit, the magistrate had a substantial basis to find, through reasonable inferences, a nexus between the capital murder, the phone, and its contents…If the phone was in or near the vehicle at the time of the murder, as suggested by its presence in the vehicle just four days after the murder, there is a fair probability that the phone would contain evidence of the offense, such as communications with accomplices, identifying information, and geo-location data. Even if it is unreasonable to infer that the phone was in the vehicle at or near the time of the offense, there is a fair probability that the phone of the appellee, the person possessing and operating the vehicle only four days later, would contain evidence of the identity of the suspects who committed the murder. Thus, the affidavit was sufficient to establish probable cause to justify the issuance of the search warrant for the appellee's phone, and the trial court erred in concluding otherwise.

[Internal citations omitted] (Appellant's brief, 29).

Standard of Review

The Fourth Amendment to the United States Constitution mandates that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV. Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location. *Flores v. State*, 319

S.W.3d 697, 702 (Tex. Crim. App. 2010) (*citing Illinois v. Gates*, 462 U.S. 213, 238, 244 n.13, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

While an appellate court typically reviews a trial judge's motion-to-suppress ruling under a bifurcated standard, a trial court's determination whether probable cause exists to support a search warrant's issuance is constrained solely to the four corners of the affidavit. *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007); *see Aguilar v. Texas*, 378 U.S. 108, 109 n.1, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) ("It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention.").

When reviewing a magistrate's decision to issue a warrant, the appellate courts apply a highly deferential standard of review because of the constitutional preference for searches conducted pursuant to a warrant over warrantless searches. *Swearingen v. State*, 143 S.W.3d 808, 810-11 (Tex. Crim. App. 2004). Provided the magistrate had a substantial basis for concluding that probable cause existed, the magistrate's probable-cause determination will be upheld. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011) (*citing Gates*, 462 U.S. at 234-37, 103 S.Ct. 2317).

The magistrate may interpret the affidavit in a non-technical, common-sense manner and may draw reasonable inferences solely from the facts and circumstances contained within the affidavit's four corners. *State v. Jordan*, 342

S.W.3d 565, 569 (Tex. Crim. App. 2011). Appellate courts should not invalidate a warrant by interpreting the affidavit in a hyper-technical, rather than a common-sense, manner. *McLain*, 337 S.W.3d at 272. When in doubt, the appellate court should defer to all reasonable inferences that the magistrate could have made. *Id.*

The affidavit

The affidavit accompanying the search warrant states that, on September 18, 2016, the complainant's brother followed two perpetrators from the home and saw them getting into a white, 4-door sedan. (State's exhibit 4). That same night, at approximately 8:45 p.m., a neighbor observed a white, 4-door sedan exiting the neighborhood "at a very high rate of speed." (State's exhibit 4). A citizen[3] informed another law enforcement officer that a white, 4-door Lexus, bearing Texas license plate #GTK-6426, was observed driving through the neighborhood "on multiple occasions" on Saturday, September 17, 2016. (State's exhibit 4).

A residential surveillance camera captured video images of a white, 4-door vehicle in the neighborhood one time prior to the murder. (State's exhibit 4). "The same vehicle" was also observed on the video three times the following day. (State's exhibit 4). The home where the surveillance was captured is "only" five residences north of where the complainant's brother observed the suspects enter a white vehicle and flee the scene. (State's exhibit 4). There is nothing in the

[3] It is unclear whether this citizen is the same person who observed the white vehicle on the night of the offense, or someone else. However, the affidavit uses a male pronoun for one and a female pronoun for the other.

affidavit to indicate that the Lexus driven by appellee was driven either before, during, or after the offense.

It was unreasonable for the magistrate to infer that the vehicle appellee was driving was connected to the offense

First, the State alleges that it was reasonable for the magistrate to infer that the Lexus appellee was driving four days after the offense was linked to the capital murder. (Appellant's brief, 21). The affidavit simply sets forth that the suspects fled in a white, 4-door sedan. (State's exhibit 4). A white, 4-door Lexus with license plate number GTK-6426 was observed in the neighborhood one time prior to the murder and three times the following day. (State's exhibit 4). There is nothing in the affidavit to indicate that the Lexus was the same white, 4-door sedan seen fleeing the scene, or linking it to the murder. For the magistrate to reasonably infer otherwise, he would have to start from the position that the two vehicles were one in the same. Descriptors such as "white," "4-door," and "sedan" are far too ordinary and common place to make such an inference[4].

It was unreasonable for the magistrate to infer that the cell phone seized from the vehicle appellee was driving contained evidence of the offense

Second, the State argues that it was "reasonable for the magistrate to infer that the phone found in the vehicle just four days after the murder contained evidence of the offense such as communications between the suspects, identifying

[4] On the other hand, a low riding, red truck with over-sized tires, and a "Q" in the license plate, would present an entirely different situation.

information, and geo-location data." (Appellant's brief, 22). For this inference to be reasonable, there would need to be some direct connection between either the Lexus or appellee and the offense. Yet, the affidavit only states that, based on the affiant's "training and experience" a "smartphone" may reveal location information and that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." (State's exhibit 4). Such general statements, alone, about the potential for electronics to contain evidence of an offense are insufficient to establish probable cause.

A cell phone may not be seized and searched simply because incriminating evidence could possibly be contained on it. The United States Supreme Court has described cell phones as "such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude [it was] an important feature of human anatomy." *Riley v. California*, ___ U.S. ___, 134 S.Ct. 2473, 2484, 189 L.Ed.2d 430 (2014); *see also Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2214, 2220, 201 L.Ed.2d 507 (2018) (recognizing that cell phones contain "vast store of sensitive information" and that "carrying one is indispensable to participation in modern society"). The Court of Criminal Appeals has observed that "a cell phone is unlike other containers as it can receive, store, and transmit an almost unlimited amount of private information" that "involve[s] the most intimate

details of a person's individual life, including text messages, emails, banking, medical, or credit card information, pictures, and videos." *State v. Granville*, 423 S.W.3d 399, 408 (Tex. Crim. App. 2014).

The State must prove on a case-by-case basis that the incriminating nature of the cell phone was immediately apparent to the officers who seized it, based on the facts and circumstances known to the officers at the moment the phone was seized. This is because such information may or may not be "associated with criminal activity," depending on the circumstances. *See, e.g., Cruse v. State*, No. 01-13-00077-CR, 2014 WL 3607250, at *3 (Tex. App.--Houston [1st Dist.] July 22, 2014, pet. ref'd) (not designated for publication) (incriminating nature of cell phones seized during sexual-assault investigation immediately apparent when officer testified that, prior to seizing phones, he had interviewed complainant and learned from her that cell phones had been used to record her assault); *Quinonez v. State*, Nos. 05-11-00868-CR & 05-11-00925-CR, 2012 WL 2149410, at *3 (Tex. App.--Dallas June 14, 2012, pet. ref'd) (not designated for publication) (incriminating nature of cell phone seized during sexual-assault investigation immediately apparent when officer testified that, prior to seizure, "ping" originating from complainant's cell phone was traced to defendant's vehicle and phone "appeared to have been recently broken" when officer found phone inside vehicle); *see also United States v. Conlan*, 786 F.3d 380, 388 (5th Cir. 2015)

(incriminating nature of laptops and cell phones found in hotel room during stalking investigation immediately apparent when officer who had ordered seizure of items "was aware of [the defendant's] harassing electronic communications").

The State does not directly address the legality of the seizure of the phone. However, appellee believes that the State will attempt to justify the initial seizure as valid pursuant to a lawful inventory, a well-defined exception to the warrant requirement of the Fourth Amendment. *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). An "inventory search" is a motor-vehicle search conducted as part of the impoundment process that is designed to produce an inventory of a vehicle's contents. *Moskey v. State*, 333 S.W.3d 696, 700 (Tex. App.--Houston [1st Dist.] 2010, no pet.). Inventory searches have several legitimate purposes - to protect the vehicle owner's property while the vehicle is in custody, to protect the police against claims or disputes over lost or stolen property, and to protect the police from potential danger. *Id*. An inventory search must be conducted in good faith and pursuant to reasonable, standardized police procedure. *Id*. The State may satisfy its burden of establishing that an inventory search was lawful by showing that (1) the driver was arrested, (2) no alternatives other than impoundment were available to ensure the vehicle's protection, (3) the impounding agency had an inventory policy, and (4) the policy was followed. *Delgado v. State*, 718 S.W.2d 718, 721 (Tex. Crim. App. 1986).

The State cannot sustain its burden in establishing a valid inventory. Appellee counters the legality of the pre-textual traffic stop in his response to appellant's second point of error. However, even if this Court finds that the stop was lawful, the State has failed to prove that law enforcement followed its own procedure and there were no other alternatives other than impoundment in order to ensure the vehicle's protection.

The HCSO policy states that an inventory is "for safekeeping purposes" and can "best be justified if the peace officer has little or no reason to believe that evidence is in the vehicle." (State's exhibit 5). The policy requires that an inventory "include the contents of closed, unlocked containers." (State's exhibit 5).

Deputy Johnson was instructed by homicide investigators to conduct a traffic stop of appellee. (RR I 9). The deputy was advised that the vehicle was going to be searched later, so he just looked through the open windows for anything in plain view. (RR I 17, 18). He testified that he did not look in any closed containers or under the seats because he did not enter the vehicle at all. (RR I 38). This is not how the deputy would ordinarily conduct an inventory. (RR I 38, 39). Thus, the search did not comport with the Sheriff's inventory policy.

Further, the State failed to establish that there was no other alternative to towing the vehicle. In fact, the record establishes that law enforcement would not

have released the vehicle because they presumably believed either the Lexus and/or appellee were involved in the murder. Because the phone was not seized pursuant to a valid inventory, the State must prove that the incriminating nature of the phone was immediately apparent to the officers at the moment it was seized.

The State fails to directly address whether the seizure of the phone was lawful. However, it cites to *King v. State* in support of its contention that the magistrate could have reasonably inferred that at least one of the suspects in the murder could have used the phone found in the car appellee was driving to plan and to execute the commission of the offense. (Appellant's brief, 23). However, the Austin court of appeals was careful to point out that the cell phone seized in that case was "discovered contemporaneously with and in the same vehicle as approximately 234 grams of methamphetamine and drug paraphernalia." *King v. State*, No. 03-17-00276-CR, 2018 WL 5728765, at *5 (Tex. App.--Austin Nov. 2, 2018, pet. ref'd) (not designated for publication).

Appellee was driving a vehicle that matched the same, very general description of a vehicle that was seen in the same neighborhood as the murder. There is no indication that it was the same vehicle, or that there was any evidence of the offense discovered in the vehicle along with the phone (e.g., the murder weapon or items stolen from the home). *Compare, Thomas v. State*, No. 14-16-00355-CR, 2017 WL 4679279, at *4 (Tex. App.--Houston [14th Dist.] Oct. 17,

2017, pet. ref'd) (not designated for publication) (Probable cause to search cell phone existed when law enforcement "directly tied the vehicle in which the cell phones were found to the armed robbery.") [Emphasis added]. Thus, the incriminating nature, if any, of the phone was not immediately apparent to law enforcement when it was seized.

The affidavit did not allege facts that the cell phone was used during the commission of the offense or shortly before or after

An affidavit offered in support of a warrant to search the contents of a cellphone must usually include facts that a cellphone was used during the crime or shortly before or after. *Foreman v. State*, 561 S.W.3d 218, 237 (Tex. App.--Houston [14th Dist.] 2018, pet. granted). In *Aguirre v. State*, this Court held that the affidavit was sufficient to search all the defendant's cellphones where the complainant said that a particular cellphone was used to photograph her, and that the defendant had used instant messenger to send her an explicit photograph. *Aguirre v. State*, 490 S.W.3d 102, 116-17 (Tex. App.--Houston [14th Dist.] 2016, no pet.). This, coupled with the affiant's opinion that pedophiles share pornography through electronic media, caused this Court to conclude that all the defendant's cellphones could be searched. *Id*.

In *Walker v. State*, this Court also concluded that there was probable cause to search the defendant's cellphone when the affidavit stated that the defendant admitted to shooting the complainant, and there was other information that the

defendant and the complainant knew each other, communicated by cellphone, and exchanged messages and phone calls around the time of the shooting. *Walker v. State*, 494 S.W.3d 905, 908-09 (Tex. App.--Houston [14th Dist.] 2016, pet. ref'd)

In *Humaran v. State*, the defendant made a "disturbance" call to police and there was evidence that she and a co-defendant had murdered a person and set the body on fire. *Humaran v. State*, 478 S.W.3d 887, 893–94 (Tex. App.--Houston [14th Dist.] 2015, pet. ref'd). Given the defendant's use of a phone, this Court concluded that the facts were sufficient to support a search of her cellphone. *Id*. at 899–900.

There is no particularized evidence that appellee was involved in committing the murder, or that the phone found in his possession four days after the murder contained any evidence of the offense. Yet, the State contends that it was reasonable for the magistrate to infer that the vehicle appellee was driving four days after the murder was the same one the suspects fled in, that "appellee possessed the vehicle at the time of the murder and was a party to its commission, that the appellee acquired the vehicle from another individual who obtained the vehicle at the time of the offense, or that the appellee acquired the vehicle from another individual who obtained the vehicle from the suspects." (Appellant's brief, 24). These are not reasonable inferences from the affidavit, but complete leaps in logic.

All these supposed reasonable inferences stem from the assumption that the white vehicle the suspects got into after the murder was the same one that appellee was driving four days after the murder. The facts do not support that. However, even if the affidavit established an inference that it could possibly be the same vehicle, there is no evidence that the cell phone found in the vehicle contained evidence of the offense without a connection between appellee and the murder or the suspects and the seized phone, or even any cellular device.

Magistrates are permitted to draw reasonable inferences from the facts and circumstances contained within the four corners of the affidavit. *Davis v. State*, 202 S.W.3d 149, 154 (Tex. Crim. App. 2006). However, "[w]hen too many inferences must be drawn, the result is a tenuous rather than substantial basis for the issuance of a warrant." *Id*. at 157. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez v. State*, 232 S.W.3d 55, 61 (Tex. Crim. App. 2007).

The State alleges that evidence that a cell phone was used immediately before or after a crime is not always necessary to establish probable cause to search the phone. (Appellee's brief, 26). In support of this, the State cites to *Johnson v. State* and *Checo v. State*. The State appears to propose that the temporal requirement is not always necessary, thus completing the analysis. However, appellant has failed to point out this Court's acknowledgment that "[w]hen there is

no evidence that a computer was directly involved in the crime, more is generally needed to justify a … search." *Foreman*, 561 S.W.3d at 237 [Emphasis added]. An example of where "more" information was present is *Checo v. State*, a case relied upon by the State.

In *Checo*, the defendant kidnapped a child and took her to a house, where he showed her adult pornography on a desktop computer. *Checo v. State*, 402 S.W.3d 440, 444 (Tex. App.--Houston [14th Dist.] 2013, pet. ref'd). The defendant then took the complainant to another room, where he attempted to assault her. *Id*. The complainant observed a laptop in that room that was set up to take pictures and videos. *Id*. The affiant obtained a warrant to search for child pornography, and the defendant moved to suppress the results of the search, arguing that there was no information in the officer's affidavits that the defendant photographed or videotaped the complainant, or other information independently linking him to child pornography. *Id*. at 449. This Court rejected that argument, noting that the affiant established specialized knowledge that those who engage children in a sexually explicit manner often collect child pornography on their computers. *Id*. Given this level of factual specificity, the Court held that the search warrant was valid. *Id*. at 449–50.

In *Thomas v. State*, the affidavit stated that officers responded to an armed robbery at a Game Stop location. *Thomas*, 2017 WL 4679279, at *3. Two black

males wearing bandanas over their faces entered the store with guns, took money from the cash register, and fled from the back of the store when officers arrived. *Id*. Officers pursued the men and found several clothing items and a gun along the route taken by the suspects. *Id*. The clothing matched items reportedly worn by the robbers. *Id*. Law enforcement tracked one of the suspects, later identified as the defendant, wearing the same clothing that he was wearing during the robbery. *Id*.

A "suspicious" vehicle was parked near the Game Stop that appeared to have been left running with the doors unlocked for an extended period of time. *Id*. Two cell phones, including the defendant's, were inside of the car. *Id*. There was a wallet in the vehicle containing a credit card and a probation identification card belonging to a co-defendant. *Id*. An individual approached and claimed that the vehicle was his and that the co-defendant had borrowed it. *Id*. The individual gave consent to search the vehicle and reported that he had received a phone call from the co-defendant shortly after the robbery in which he told the owner of the vehicle "me and Jay hit a place and they caught Jay." *Id*. The co-defendant also stated that the vehicle had been left at the Game Stop. *Id*. The individual identified the co-defendant from a photographic lineup as the person who had told him on the phone that he "hit a lick" and "they caught Jay." *Id*.

Unlike in this case, the affiant in *Thomas* directly tied the vehicle in which the cell phones were found to the offense. He also connected the defendant to the

offense shortly after it occurred. Additionally, the affiant explained that based on his training and experience, robbery suspects often communicate through cell phones in preparation for committing the offense. *Id*., at *4. Thus, the magistrate reasonably could have inferred from common sense and the facts recounted in the affidavit that there was a fair probability or substantial chance that cell phones found in the apparent getaway car would contain evidence pertaining to the robbery or who committed the robbery. *Id.*

Conclusion

The trial court did not err in granting appellee's motion to suppress the seizure and search of his cell phone. There is no probable cause to believe that appellee, or the vehicle he was driving four days after the offense, were linked to the capital murder. Further, there is no evidence that the seized cell phone contained evidence of the offense. To infer otherwise is unreasonable. This Court should deny appellant's first point of error and affirm the trial court's order granting the motion to suppress.

REPLY TO APPELLANT'S SECOND POINT OF ERROR

In its second point of error, the State contends that the trial court abused its discretion in suppressing appellee's statements because appellee was stopped and arrested for a valid traffic violation. Deputy Michael Johnson was instructed by officers with the HCSO Homicide Division to conduct a traffic stop on a white

Lexus that was traveling on the North Freeway. (RR I 9). Johnson testified at the suppression hearing that he observed appellee travel from the middle lane, continue smoothly into the right lane, and onto the exit ramp. (RR I 10). Appellee used a turn signal, but Johnson felt the "gliding" across the lanes was unsafe. (RR I 11).

Appellee was subsequently arrested and transported to the HCSO to be interrogated. (RR I 16, 17). Johnson testified that he would not ordinarily arrest someone for an unsafe lane change, but he was instructed to do so in this case. (RR I 26). The State specifically alleges that the trial court abused its discretion in granting the motion to suppress because appellee committed an unsafe lane change. TEX. TRANSP. CODE § 545.060(a). It also claims that appellee committed another traffic violation by crossing into the striped, triangular marking on the road that separates the exit lane from the main lanes. TEX. TRANSP. CODE ANN. § 544.004(a).

Standard of Review

A peace officer must have a reasonable suspicion that criminal activity is afoot in order to lawfully detain a person. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Woods v. State*, 956 S.W.2d 33, 35 (Tex. Crim. App. 1997); *Reynolds v. State*, 962 S.W.2d 307, 311 (Tex. App.--Houston [14th Dist.] 1998, pet. ref'd). An appellate court must examine the reasonableness of a

temporary detention in light of the totality of the circumstances. *Woods*, 956 S.W.2d at 38. An officer must have "specific articulable facts which, in light of his experience and personal knowledge, together with other inferences from those facts" would justify the detention. *Reynolds*, 962 S.W.2d at 311 (citing *Johnson v. State*, 658 S.W.2d 623, 626 (Tex. Crim. App. 1983)). These facts and experiences must create a reasonable suspicion in the officer's mind that some unusual activity is or has occurred, that the detained person is connected with the activity, and that the unusual activity is related to the commission of a crime. *Davis v. State*, 947 S.W.2d 240, 244 (Tex. Crim. App. 1997). In determining whether the officer's suspicion was reasonable, an appellate court employs an objective standard: whether the facts available to the officer at the moment of detention warrant a person of reasonable caution to believe that the action taken was appropriate. *Terry*, 392 U.S. at 21-22, 88 S.Ct. 1868.

It is undisputed that a detention is justified when a person commits a traffic violation in an officer's presence. *See,* e.g.*, McVickers v. State*, 874 S.W.2d 662, 664 (Tex. Crim. App. 1993) (running a red light); *Garcia v. State*, 827 S.W.2d 937, 944 (Tex. Crim. App. 1992) (running a stop sign); *Armitage v. State*, 637 S.W.2d 936, 939 (Tex. Crim. App. 1982) (driving with a defective taillight).

<u>The State has failed to establish that the lane change was made in an unsafe manner</u>

Making a multiple lane change in a single maneuver is not a per se violation of any law; however, section 545.060(a) of the Transportation Code provides:

An operator on a roadway divided into two or more clearly marked lanes for traffic:

(1) shall drive as nearly as practical entirely within a single lane; and

(2) may not move from the lane unless that movement can be made safely.

TEX. TRANSP. CODE ANN. § 545.060(a)

"'The elements of failure to drive in a single marked lane are: (1) a person (2) drives or operates (3) a motor vehicle (4) within a single marked lane, and (5) moves from that lane without first ascertaining that such movement can be made with safety.'" *Atkinson v. State*, 848 S.W.2d 813, 815 (Tex. App.--Houston [14th Dist.] 1993, pet. ref'd) (interpreting § 545.060(a)'s predecessor, TEX. REV. CIV. STAT. ANN. art. 6701d, § 60(a). Thus, the question before this Court is whether a person of reasonable caution would believe that the appellee's multiple lane change could not have been made safely given the facts and experiences related by Deputy Johnson.

This Court considered similar facts in *Aviles v. State*. Houston police officer Robert Bogany received information from his fellow officer that the vehicle Aviles was driving was possibly carrying narcotics. *Aviles v. State*, 23 S.W.3d 74, 75 (Tex. App.--Houston [14th Dist.] May 18, 2000, pet. ref'd.). Officer Bogany

spotted the defendant driving in the far-left lane on the highway. *Id.* After following the vehicle for about a mile, the officer saw the defendant signal and then move over two lanes just before passing a disabled automobile on the left shoulder. *Id.* Aviles then took the exit from the highway. *Id.* Officer Bogany shortly thereafter pulled the defendant over for making a multiple lane change. *Id.* Aviles was subsequently arrested for possession of a controlled substance. *Id.*, at 76.

In *Aviles*, the state argued that it is inherently unsafe to make a multiple lane change. *Id.*, at 77-78. This Court rejected that argument and found, considering the facts presented, that because "there is no evidence in the record to demonstrate that [Aviles'] multiple lane change was accomplished in an unsafe manner, we find the police officer did not have a reasonable basis for believing [Aviles] committed a ticketable traffic offense.." *Id.*, at 78.

Like in *Aviles*, appellee used a turn signal, did not cut off another vehicle, did not cause an accident, and did not commit any other traffic violations. (RR I 30; State's exhibit 1). The State concedes that "a multiple-lane change is not inherently unsafe…" (Appellant's brief, 34). But it contends that, under the facts presented, the officer was reasonable in believing that the maneuver was unsafe.

An officer's ulterior motives in conducting a detention do not necessarily invalidate a lawful traffic stop. *See Crittenden v. State*, 899 S.W.2d 668, 674 (Tex.

Crim. App. 1995) (holding that an objectively valid traffic stop is not unlawful "just because the detaining officer had some ulterior motive for making it"). However, the ultimate reason for this stop must be considered in weighing the officer's opinion regarding the safety of appellee's driving. It is undisputed that Deputy Johnson was instructed to follow appellee and develop "probable cause" to stop him. (RR I 9, 126). In fact, the deputy was unable to conduct a proper inventory because it was predetermined that appellee would be arrested and the car ultimately would be searched. (RR I 17, 18). Since he was ordered to develop "probable cause" for the stop, it is unbelievable that Deputy Johnson would ever admit that appellee's lane changes were conducted safely. (RR I 26).

Furthermore, the video does not support the State's assertion that the lane change was unsafe. Appellee used his turn signal and moved into the exit lane. (State's exhibit, 1). While there were other cars on the road, appellee did not cut anyone off and the video does not depict the car behind him even having to use its breaks. (State's exhibit, 1).

The State has failed to establish that appellee disregarded a traffic control device or marking.

The operator of a vehicle shall comply with an applicable official traffic-control device unless the person is otherwise directed by a traffic or police officer; or operating an authorized emergency vehicle and is subject to exceptions. TEX. TRANSP. CODE ANN. § 544.004(a). An official traffic-control device is defined as a

"sign, signal, marking, or other device that is: (A) consistent with this subtitle; (B) placed or erected by a public body or officer having jurisdiction; and (C) used to regulate, warn, or guide traffic." TEX. TRANSP. CODE ANN. § 541.304(1).

The State alleges that appellee crossed into the striped, triangle markings on the road separating the exit lane from the main lanes. However, the State does not cite to any law or cases that driving in this specific area this is a traffic violation. And the video does not support the allegation that appellee actually crossed into this zone.

In *State v. Palmer*, Grapevine Police Officer Mark Shimmick testified in a suppression hearing that he was driving southbound on Highway 121 when he noticed the defendant's car traveling five miles below the speed limit in the rightmost lane and "riding the right line of the roadway." *State v. Palmer*, No. 2-03-526-CR, 2005 WL 555281, at *1 (Tex. App.--Fort Worth Mar. 10, 2005, pet. dism.) (not designated for publication). After observing some concerning driving behavior that was not a violation of the traffic code, the defendant activated his right turn signal and moved onto the service road. *Id.* In doing so, the defendant crossed over the double white line. The State alleged that this was a violation of § 544.004 of the transportation code.

The Fort Worth Court of Appeals declined to specifically find that the double white lines were a "traffic control device" within the meaning of § 544.004.

But even if they were, the court found that the State cited no authority that defined their purpose or what constituted a failure to comply with them. *Palmer*, 2005 WL 555281, at *4. Therefore, the court held that the officer did not have reasonable suspicion or probable cause to believe that the defendant violated § 544.004 solely because his right rear tire touched a portion of the double white lines. *Id.*

The State has not offered any evidence that the striped area is an official traffic control device governed by the Transportation Code. It has also failed to establish its purpose and what legally constitutes a failure to comply with remaining out of the area. Finally, the video does not show that appellee even entered the striped portion of the highway. Considering all the above, the trial court did not abuse its discretion in finding that Officer Johnson did not have reasonable suspicion to believe appellee committed a violation of § 544.004 of the Transportation Code.

Conclusion

The trial court did not abuse its discretion in granting appellee's motion to suppress his statements. There was no reasonable suspicion to believe that appellee committed an unsafe lane change or that he disregarded a traffic control device. This Court should deny appellee's second point of error and affirm the trial court's order granting the motion to suppress.

CONCLUSION

Appellee respectfully urges this Court to overrule appellant's points of error and uphold the trial court's order suppressing evidence derived from the search warrant and the unlawful traffic stop.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Texas Rules of Appellate Procedure, I hereby certify that appellant's brief, filed on June 11, 2019, has 7,527 words based upon a word count under MS Word.

/s/ Mandy Miller
MANDY MILLER

CERTIFICATE OF SERVICE

Appellant has transmitted a copy of the foregoing instrument to counsel for the State of Texas via eservice on June 11, 2019 at:

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